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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTONIO ROMERO,

Defendant and Appellant.

2d Crim. No. B168960
(Super. Ct. No. F341297)
(San Luis Obispo County)

After a court trial, appellant was found to be a Mentally Disordered Offender (MDO) and committed to Atascadero State Hospital (ASH) for treatment. He argues that he was denied his right to a jury trial. Our holding in *People v. Otis* (1999) 70 Cal.App.4th 1174 requires that we reject his argument.

FACTS

While on a Greyhound bus, appellant took a four-year-old boy from his mother and threatened to kill him. Appellant, acting under the delusional belief that people were following him and trying to kill him, apparently grabbed the boy for protection. A bystander intervened and appellant released the boy, who was unhurt. The bus driver called the police and appellant was arrested.

Appellant was convicted of three counts of making criminal threats and sentenced to two years in state prison. (Pen. Code, § 422.)¹ After serving his sentence, the Board of Prison Terms (BPT) determined that appellant met the criteria for an MDO under section 2962 and recommended that he be confined to ASH as a condition of parole. Appellant filed a petition requesting that the trial court overturn the determination of the BPT.

At a readiness conference, appellant's attorney waived a jury trial. The conference hearing was not transcribed and neither the district attorney nor appellant's counsel could recall whether appellant had objected to the waiver. At the court trial, appellant's treating physician at ASH testified that appellant suffered from a "psychotic disorder, not otherwise specified" and met the statutory criteria to qualify as an MDO. He recounted that, while incarcerated, appellant experienced paranoid delusions that caused him to assault other inmates. The trial court found that appellant met the statutory criteria beyond a reasonable doubt, certified appellant as an MDO and ordered him committed to ASH.

DISCUSSION

The MDO Act allows the state to civilly commit certain types of prisoners for mental health treatment as a condition of parole. In order to commit a prisoner, the state must prove beyond a reasonable doubt that he meets the criteria for an MDO under section 2962, subdivisions (a) through (d). Appellant does not challenge his status as an MDO, but argues that he was denied his right to a jury trial. He maintains that he is entitled to a jury trial under the Sixth Amendment of the United States Constitution as well as under the MDO statutory scheme.

¹ All further statutory references are to the Penal Code.

Constitutional Right to a Jury Trial

In a criminal proceeding, the defendant has a federal and state constitutional right to a jury trial, which must be waived by the defendant personally. (*People v. Montoya* (2001) 86 Cal.App.4th 825, 829.) However, these constitutional protections are inapplicable to an MDO proceeding because it is a civil matter. (§ 2972, subd. (a); *Montoya*, at p. 830.)

Appellant acknowledges that California courts have established that MDO proceedings are civil in nature. However, he points to certain protections that are common to both criminal matters and MDO proceedings: the People carry the burden of proof and must prove the statutory criteria beyond reasonable doubt; the petitioner has a right to appointed counsel and is entitled to a unanimous jury verdict. (§ 2972, subds. (a)-(b).) Appellant argues that, because MDO proceedings have these protections, constitutional protections should also apply. Appellant's argument is unsupported by authority and contrary to established precedent. He has no constitutional right to a jury trial.

Statutory Right to a Jury Trial

We next consider appellant's right to a jury trial under the MDO statute. Section 2966, subdivision (b) provides in part, "The trial will be by jury unless waived by both the person and the district attorney." Appellant argues that he is entitled to a jury trial because he did not personally waive the jury.

We addressed the interpretation of section 2966 in *People v. Otis*, *supra*, 70 Cal.App.4th 1174. Otis was adjudged an MDO and, on the day of trial, his counsel waived a jury. He objected and requested a jury trial, arguing that he must "personally" waive a jury under the statute. (*Otis* at p. 1176.)

In *Otis*, we concluded that the word "person" in the statute was not a requirement the waiver be made by the person himself. The language did not preclude an attorney from acting on his client's behalf. (*People v. Otis, supra*, 70 Cal.App.4th at p. 1176.) "Section 2966 concerns persons who have been found by

the Board of Prison Terms to be mentally disordered. The Legislature must have contemplated that many persons, such as Otis, might not be sufficiently competent to determine their own best interests. There is no reason to believe the Legislature intended to leave the decision on whether trial should be before the court or a jury in the hands of such a person." (*Otis*, at p. 1177; *People v. Montoya*, *supra*, 86 Cal.App.4th at p. 830.)

The same principles are applicable here. There is no statutory requirement that the petitioner must personally waive a jury. (*People v. Otis*, *supra*, 70 Cal.App.4th at p. 1177.) Appellant acknowledges that *Otis* is controlling law, but does not attempt to distinguish it. He requests that we overrule *Otis*, reverse the trial court's decision and remand for retrial. We decline his request for the reasons cited above. Appellant also contends that, having been given a statutory right to a jury trial under section 2966, this right is protected by due process principles. We reject this argument because an alleged MDO does not have a federal due process right to a trial by jury. (*People v. Montoya*, *supra*, 86 Cal.App.4th at pp. 831-832.)

Appellant cites *In re Qawi* (2004) 32 Cal.4th 1, for the proposition that he was entitled to a competency hearing before the court accepted his counsel's waiver. In *Qawi*, the Supreme Court held that there are "nonemergency" situations in which an MDO can be compelled to take antipsychotic medications. One such situation is if the trial court finds that the "MDO is incompetent or incapable of making decisions about his medical treatment" (*Id.* at pp. 9-10.) The court may make this determination when an MDO is committed, recommitted, or in a separate proceeding. (*Id.* at p. 9.) *Qawi* does not advance appellant's position. The Supreme Court expressly limited its holding to cases concerning forcible medication. "We emphasize that this opinion is concerned with the right to refuse antipsychotic medication and not mental health treatment in general." (*Id.* at p. 15, fn. 4.) There was no error.

The judgment is affirmed.

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COFFEE, J.

We concur:

YEGAN, Acting P.J.

PERREN, J.

Christopher G. Money, Judge

Barry T. Labarbera, Judge

Superior Court County of San Luis Obispo

Danalynn Pritz, under appointment by the Court of Appeal, for
Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief
Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney
General, Jaime L. Fuster, Lance E. Winters, Supervising Deputy Attorneys
General, for Plaintiff and Respondent.